IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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No. 75-777

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICI CURIAE* AND BRIEF OF AIR-CONDITIONING AND REFRIGERATION INSTITUTE, ASSOCIATED BUILDERS AND CONTRACTORS, INC., AMERICAN BOILER MANUFACTURERS ASSOCIATION, AMERICAN CONSULTING ENGINEERS COUNCIL, THE AMERICAN INSTITUTE OF ARCHITECTS, AIR MOVING AND CONDITIONING ASSOCIATION, INC., ARCHITECTURAL WOODWORK INSTITUTE, MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA, INC., NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION AS *AMICI CURIAE*

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICI CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Air-Conditioning and Refrigeration Institute, Associated Builders and Contractors, Inc., American Boiler Manufacturers Association, American Consulting Engineers Council, The American Institute of Architects, Air Moving and Conditioning Associa-

tion, Inc., Architectural Woodwork Institute, Mechanical Contractors Association of America, Inc., National Electrical Manufacturers Association, National Society of Professional Engineers, and National Woodwork Manufacturers Association respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the petitioner, National Labor Relations Board, on the merits of the above-captioned case. In support of this motion the above-named associations show as follows:

1. This motion for leave to file is necessary under Rule 42(3) because counsel for the Respondent Union has advised the undersigned that the Union will not consent to the filing of any *amicus curiae* briefs in this case.

2. This Court previously granted the motion of the above-named associations for leave to submit a brief in support of the petition for writ of certiorari in this case. That motion was granted on February 23, 1976, the same day that the petition was granted.

3. The interest of the above-named associations in the issues presented in this case was set forth at length in our previous motion, referred to in paragraph 2 above, and is fully detailed in the accompanying brief at pp. 2-11. Briefly, these associations have long maintained an active interest in the status of the Naional Labor Relations Board's "right to control" doctrine, the validity and proper application of which are at issue in this case.

4. Application of the "right to control" test has a substantial impact on the ability of building trades unions to effectuate product boycotts on construction

projects. Such boycotts are a major weapon used by the unions to exclude prefabricated and factory-assembled products and materials from construction sites and force resort to less efficient, and frequently less satisfactory, jobsite fabrication techniques. In many instances, the authority to decide what products or methods of fabrication will be used rests exclusively with the architect, the consulting engineer, the project owner, or the manufacturer of the product in question, and the jobsite contractor is simply hired to install the completed product in accordance with their specifications. Nevertheless, building trades unions frequently seek to exclude prefabricated products from the project to force other modifications in the project specifications by striking or threatening to strike the subcontractor who employs their members on the job. Application of the "right to control" test effectuates the Congressional purpose of Section 8(b)(4)(B) by providing jobsite contractors with effective protection against involvement in such disputes when they are powerless to resolve them. It also protects the right of architects, engineers, builders and manufacturers to utilize the products and fabrication techniques best suited to the needs of their projects without interference from unions to whom they owe no bargaining duty.

5. The associations joining this motion have a substantial interest in the continued application of the "right to control" test. They represent a broad cross-section of the construction industry, including the designers, specifiers, manufacturers and installers of products and materials used in construction throughout the United States. The associations join-

ing herein have broad knowledge of problems arising out of efforts to exclude manufactured products from construction sites and of the effectiveness of the "right to control" doctrine in preventing such efforts. In particular, they have had experience with a number of product boycott attributable, at least in part, to the present uncertainty about the validity of the "right to control" test. They have participated individually and jointly in numerous cases before the NLRB and the courts in which the validity and application of the doctrine have been litigated, including joint participation as *amici curiae* in the proceedings before the court of appeals in the instant case. Because of this background and the extensive experience their constituents have had with product boycotts, the associations joining herein are uniquely situated to brief this Court on the practical, as well as the legal, aspects of the issues presented in this case.

WHEREFORE it is respectfully moved that the above-named associations be granted leave to submit the accompanying brief as *amici curiae* on the merits of this case.

Respectfully submitted,

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Dated at Washington, D.C.,
this 30th day of April, 1976.

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BRIEF OF AIR-CONDITIONING AND REFRIGERATION INSTITUTE, ASSOCIATED BUILDERS AND CONTRACTORS, INC., AMERICAN BOILER MANUFACTURERS ASSOCIATION, AMERICAN CONSULTING ENGINEERS COUNCIL, THE AMERICAN INSTITUTE OF ARCHITECTS, AIR MOVING AND CONDITIONING ASSOCIATION, INC., ARCHITECTURAL WOODWORK INSTITUTE, MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA, INC., NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, AS AMICI CURIAE

INTRODUCTION

This brief is submitted, contingent upon the Court's granting of the accompanying Motion for Leave, pursuant to Rule 42(3) of the Rules of this Court, on behalf of Air-Conditioning and Refrigeration Institute, Associated Builders and Contractors, Inc., American Boiler Manufacturers Association, American Consulting Engineers Council, The American Institute of Architects, Air Moving and Conditioning Association, Inc., Architectural Woodwork Institute, Mechanical Contractors Association of America, Inc., National Electrical Manufacturers Association, National Society of Professional Engineers, and National Woodwork Manufacturers Association, as *amici curiae*. The *amici* support the position of the petitioner, the National Labor Relations Board, in the instant case.

INTEREST OF THE AMICI CURIAE

The associations participating in this joint brief represent a broad cross-section of the manufacturers, designers, specifiers and installers of products and materials used in construction throughout the United States. They have participated individually and jointly in numerous cases before the National Labor Relations Board, the lower federal courts and this Court presenting issues relating to the legality of boycotts of prefabricated products in the construction industry. They participated jointly as *amici curiae* before the NLRB and the court of appeals in *Local 438, United Ass'n*, 201 NLRB 59 (1973), enf'd sub. nom. *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973), in which the Board re-

stated and clarified, and the court approved, the so-called "right to control" test for determining whether a party subjected to union pressures in furtherance of a product boycott is a neutral entitled to the protection of Section 8(b)(4)(B) of the Act. They also participated as *amici curiae* before the courts of appeals in the instant case and in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975), both of which cases raised issues concerning the "right to control" test in the context of construction industry product boycotts.

While the *amici* thus have a substantial common interest in the issues presented in this case, they have varying economic stakes in the outcome of these proceedings. The interest of each of the *amici* is set forth below.

A. Air-Conditioning and Refrigeration Institute (ARI)

ARI is a national trade association consisting of approximately 175 manufacturing companies in the air-conditioning and refrigeration industry. These companies are the principal manufacturers of the end-products and components in this industry, which has a total volume annually in excess of $3.4 billion. Plants of ARI members are located throughout the United States and the air-conditioning and refrigeration equipment they manufacture is sold and shipped to every state and to foreign countries.

Among the end-products manufactured by ARI's members and certain others are so-called "packaged" equipment. These are products which are manufactured, assembled, and by necessity tested for safety

and efficiency at the factory, and then shipped to the job site for installation in a residence, apartment house, office building, factory or commercial establishment. Units of this type are the subject of the Union's boycott in the instant case.

ARI members have a substantial and long-standing interest in the development of the law concerning product boycotts, since the freedom to install their products on construction sites is essential to the orderly distribution of such products. Frequently they have been involved in attempts by unions to prevent installation of their products, including instances which were the subject of litigation before the Board and the courts. See, e.g., *Local 636, United Association (Mechanical Contractors Association of Detroit, Inc.)*, 177 NLRB 189, rev'd. *Local Union No. 636, United Association* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir. 1970); *Local 636, United Association*, 189 NLRB 661 (1971).

B. Associated Builders and Contractors, Inc. (ABC)

ABC is a nonprofit incorporated association with over 7,000 member firms who are largely construction contractors and firms who do business with the contract construction industry. The value of construction work performed by its members exceeds $4,000,000,000 annually.

ABC members have frequently encountered problems in connection with efforts of building trades unions to prevent the installation of factory made components despite the contractors' lack of control over such components.

C. American Boiler Manufacturers Association (ABMA)

ABMA is a trade association composed of 87 member companies engaged in the manufacture and sale of primary heat and power generating equipment, fuel burning systems, and air pollution control systems. These companies, which are located throughout the United States, are the principal manufacturers of packaged boilers and components. A packaged boiler is a complete, prefabricated, steam-generating unit. It requires no further fabrication work after it leaves the factory; it need only be installed at the place of operation. Packaged boilers are made in factories utilizing assembly-line production methods and employing trained specialists. Almost all are shop-tested and inspected prior to shipment, warranted against defects, and bear an Underwriters Laboratory Seal indicating conformance with specified standards.

ABMA members have manufactured packaged boilers since 1932. Their annual production of such boilers now exceeds $100,000,000 annually. The increased demand for their products in recent years is responsive to many factors, including, a unit design which assures better quality and greater efficiency, a lower price, and the fact of single-manufacturer responsibility for defects and malfunctioning.

Some of ABMA's efforts to combat boycotts against packaged boilers are set out in *ABMA* v. *N.L.R.B.*, 404 F.2d 547 and 404 F.2d 556 (8th Cir., 1968), cert. den. 398 U.S. 960 (1970).

D. American Consulting Engineers Council (ACEC)

ACEC is a federation of state and regional associations comprising some 2,600 independent engineering firms. These firms range from highly specialized sole proprietors to large, multioffice general practitioners. The firms represent more than 7,000 legally registered (in accord with state laws) principals and partners, plus more than 40,000 engineering technicians and other employees.

Consulting engineering is a $3 billion per year U.S. industry. Firms design: airports, bridges, dams, harbors, parks, power plants, stadia, waste treatment plants and similar facilities worth $35 billion.

The objectives of the ACEC include: protection of public interest, expansion of engineering technology, improvement of the standards of consulting engineering practice and advancement of the engineering professional in general. Member companies must observe high professional and ethical standards and are prohibited from maintaining any commercial, manufacturing or other affiliation which might influence the selection or specification of equipment, methods or materials used on their projects. In carrying out these objectives, ACEC has frequently experienced the adverse effect of union restrictions on the use of new and improved products and technology.

E. The American Institute of Architects (AIA)

The AIA is the national society for the architectural profession and represents 24,000 licensed practitioners. Architects play a major role in determining the man-made environment in which we spend

85 percent of our lives. Their design decisions on behalf of their clients, affecting tens of billions of dollars of construction annually, are translated through drawings and written specifications into our physical environment.

The architect constantly seeks innovative approaches to improve the built environment as well as to foster efficiency and progress. To achieve these objectives, the architect's designs, drawings, and written specifications require sufficient legal protection to enable them to benefit the client and the general public. To protect the public from the random and potentially harmful effects of a malconstructed environment that may be caused by unwarranted intrusions in the process of implementing the architect's design, it is essential that the architect retain unimpeded control over the components, materials and methods used during the entire duration of the project.

F. Air Moving and Conditioning Association, Inc. (AMCA)

AMCA is an international trade association comprised of companies manufacturing fans and other air moving devices used in industrial and commercial ventilating and air-conditioning systems. An affiliated division includes manufacturers of louvers, dampers and shutters. The total membership includes 67 U. S. manufacturers. Products which they produce are valued at approximately $200,000,000 annually. The Association owns and operates its own testing laboratory at its headquarters in Arlington Heights, Illinois.

The principal activities of AMCA include the promulgation of performance test standards for its

products and the administration of certification programs covering published performance ratings. These programs are designed to insure that the user gets the performance from a product which is claimed by its published ratings. For the program to be effective, it is essential that the purchaser or his agent has the right to select the equipment which, in his judgment, is best suited for his use. Consequently, any unnecessary or unwarranted restrictions on that right are of great concern to AMCA and its members.

G. Architectural Woodwork Institute (AWI)

AWI is a national trade association of 380 manufacturers and distributors of architectural woodwork. Products of its members consist of a wide variety of precut, prefit or preassembled items or materials, such as beams, special windows, doors, wall paneling, cabinet work and all forms of custom mill work for architectural and aesthetic purposes, used in homes, public buildings, schools and churches. The total volume of such products produced by AWI members approximates $150,000,000 annually.

Building trades unions have frequently hampered the sale and distribution of products of the type manufactured by AWI members. Consequently, AWI is deeply concerned about the development and implementation of laws dealing with eliminating restrictions on use and installation of the products manufactured by its members.

H. Mechanical Contractors Association of America, Inc. (MCAA)

MCAA is a national association of contractors engaged primarily in heating, air conditioning, plumbing, service work and industrial and process piping, with approximately 1400 contractor members in the United States. These contractors employ over 90,000 persons, and do an annual volume of business in excess of $7 billion.

Approximately 75 percent of said contractors belong to local associations which are affiliated with MCAA. The remaining 25 percent are affiliated directly with MCAA, without membership in any intermediate association. MCAA has 57 affiliated local associations.

Types of prefabricated equipment installed by MCAA members include air conditioning and refrigerating equipment, heat exchangers, waste heat boilers, steam generator sets, gas and air compressors, fuel oil pumping and heating units, gas purifiers, gas and oil fired heaters, coal and ash systems, demineralizers, desuperheater stations, air conveying systems, hydrogen and hydrogen chloride units, hydrogen cyanide and hydrogen sulfide assemblies, unipak gasoline plants, and sterilizing units.

The issue presented in this case is of fundamental importance to MCAA. The ability to install modern preassembled equipment and appurtenances, without artificial encumbrances which limit efficiency and increase costs, is essential to our economy and to our contractors installing such equipment.

I. National Electrical Manufacturers Association (NEMA)

NEMA is a national trade association consisting of approximately 540 members who manufacture, *inter alia*, electrical control panels, enclosed switches, panel boards, industrial controls, conduit fittings,

outlet and switch boxes and wiring devices installed in all types of structures during their erection on construction sites. Total sales of the electrical manufacturing industry in 1973 amounted to over $58 billion.

Union efforts to interfere with installation and use of products manufactured by NEMA members have adversely affected the sale and installation of such products.

J. National Society of Professional Engineers (NSPE)

NSPE is composed of 67,000 members through 53 affiliated state organizations (including the District of Columbia, Puerto Rico and Guam) and approximately 500 local chapters. The members are involved in all fields of engineering practice and all branches of engineering.

Approximately 13,000 of the Society members are engaged in the private practice of engineering and will be particularly and seriously affected by any change in the law applicable to product boycotts which diminishes their right to specify certain products and equipment for projects.

Also, many members of the Society are engaged in engineering activity for industry and for federal, state and local governments and have a substantial interest as representatives of clients of engineers in private practice on the issue before the Court.

The NSPE was organized in 1934 for the "advancement of the public welfare and the promotion of the professional, social and economic interests of the engineering profession" and in accordance with

that purpose has actively participated in the development and enactment of labor legislation affecting the interests of engineers and has participated in cases involving engineers before the NLRB and courts as *amicus curiae*.

K. National Woodwork Manufacturers Association (NWMA)

NWMA actively represents the interests of wood door, window and millwork manufacturers. Its membership currently includes approximately 90 manufacturers and 20 associates who are suppliers to the industry. Their production represents the majority of wood windows and doors made in the United States and amounts to approximately $300,000,000 annually.

NWMA members deal with all members of the construction team: the architect, the supplier, and the builder. They are well versed in all areas of building and component costs involved. Their products are used in all types of construction, including private, single-family homes; government project housing; apartment housing; and commercial buildings. Their primary concern has been the manufacture of high quality products at reasonable prices.

NWMA's interest in union restrictions on use of manufactured products on construction sites is exemplified by its role as charging party in the proceedings which culminated in the decision of this Court in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967).

THE POSITION OF THE AMICI CURIAE

As set forth more fully in the argument, the *amici curiae* joining in this brief urge the Court to approve the "right to control" doctrine, as applied by the Board, as a valid test for determining whether union pressures to prevent the use of factory fabricated products in the construction industry have been directed at neutrals entitled to the protection of Section 8(b)(4)(B) of the Act.

The practical need for a clear, effective method of determining the legality or illegality of product boycotts on construction sites is imperative. The "right to control" doctrine provides such a method. It is the logical outgrowth of over 28 years of Board experience in implementing Section 8(b)(4). It is fully consistent with the legislative purposes as set out in the Labor Management Relations Act of 1947 and amendments included in Title VII of the Labor-Management Reporting and Disclosure Act of 1959. It is neither rejected nor weakened by the *National Woodwork* decision and is consistent with other U.S. Supreme Court decisions and with the policies of the federal antitrust laws.

ARGUMENT

THE "RIGHT TO CONTROL" TEST, AS APPLIED BY THE LABOR BOARD, IS A VALID, PRACTICAL TEST FOR DETERMINING WHETHER EMPLOYERS SUBJECTED TO UNION PRESSURES IN FURTHERANCE OF PRODUCT BOYCOTTS ARE NEUTRALS ENTITLED TO THE PROTECTION OF SECTION 8(b)(4)(B) OF THE ACT

I. Introduction

In the recent *Koch* case,[1] the Board re-examined and, to an extent, redefined its policies with respect to the effectuation of product boycotts through secondary pressures in the construction industry. Recognizing that criticism from some courts and commentators of its "right to control test" may have stemmed in part from the Board's use of that label without fully explicating the rationale for its decisions, the Board undertook to clarify the weight it ascribes to a pressured employer's "contract right of control," or lack of it, in determining whether pressures against him were primary or secondary. The Board also clarified the interrelationship of the "control" element with other factors it considers in making this determination, emphasizing that it does not apply a rigid *per se* or mechanical test.

Nevertheless, the Board made it clear that it adheres to the basic view that the struck employer's control, or lack thereof, over the assignment of particular disputed work is a principal criterion which must be considered in determining whether union

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[1] *Local No. 438, United Ass'n*, 201 NLRB 59 (1973), 82 LRRM 1113, enf'd sub nom. *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973).

pressures against that employer are undertaken for their effect on him or on someone else. "[W]here the pressured employer cannot himself accede to the union's wishes," the Board stated, it normally follows that "the pressure is secondary because it is undertaken for its effect elsewhere." (*Koch, supra*, 201 NLRB at 63). In reconfirming this approach, the Board expressly noted its continuing disagreement with the courts of appeals panels which have held, in effect, that whenever a union is seeking to "preserve" work for the employees it represents, it may do so by economic action against their immediate employer, regardless of whether or not he has the power to award such work. (*Ibid.*).

The Board's disagreement with the critics of the "right to control" test then, is more than a mere semantic dispute over the proper phraseology of the standard to be applied by the Board in such cases. Indeed, the court below declared broadly that the Board's view "impermissibly expands the Congressionally intended scope of Section 8(b)(4)(B)." (521 F.2d at 889). The ultimate issue, therefore, is whether building trades unions will be allowed, under the banner of "work preservation," to engage in work stoppages and refusals to handle prefabricated materials directed against contractors and subcontractors who are powerless to award the unions the work they seek and who must therefore rely on others—the project owners, designers and general contractors—to make the concessions necessary to end the labor dispute and relieve the subcontractors from the union's pressures. As we show below, the final resolution of this issue will have an important

impact on the construction industry and the economy in general.

From the outset, we respectfully urge that the Court consider the issues presented in this case in the context of the real world in which we live and not as an intellectual exercise in legalistic abstractions. Too often court opinions interpreting Section 8(b)(4) and 8(e) have exhaustively discussed nuances of primary and secondary conduct, speculative theories of exceptions to the statutory language unexpressed by the Congress, and a variety of hypotheses for avoiding implementing the restrictions on union activity embodied in the law. Too often the courts have, as Mr. Justice Stewart said in his dissent in *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 650 (1967), ". . . [undertaken] a protracted review of legislative and decisional history in an effort to show that the clear words of the statute should be disregarded in these cases."

The success of an administrative agency in performing its function of interpreting and enforcing confusing, and sometimes ambiguous, language rests on the ability of the agency to devise practical methods for implementing the Congressional purpose as expressed in the statute. The courts have given such agencies, including the Board, great leeway in accomplishing this purpose. See, *e.g.*, *Local 1976, United Bhd. of Carpenters, et al.* v. *N.L.R.B.*, 357 U.S. 93, 107 (1958). The right to control doctrine, as evolved and implemented by the Board, is an excellent example of effective interpretation of a complex statute and of the Board's expertise in devising and implementing a logical and understandable means of carrying out the intent of Congress.

Therefore, we urge that the Court, while considering the specific legal questions raised in this proceeding, reflect also upon the practical consequences for the construction industry flowing from the Board's decision in this case as compared with the consequences of the court of appeals' decision.

II. The Right to Control Doctrine Is A Necessary and Effective Tool in Implementing the Congressional Intent to Eliminate Secondary Product Boycotts

Congress recognized in 1947, when it included secondary boycott restrictions in the Taft-Hartley amendments, that efficiency in construction depends, in large measure, on the elimination of product boycotts. The legislative history surrounding the 1959 Landrum-Griffin amendments may not be a model of clarity, but it is unmistakable that Congress, in amending Section 8(b)(4) and enacting Section 8(e), was attempting to close the loopholes that had developed in these restrictions.[2] The right to control doctrine, as applied in current Board decisions, offers an effective method to implement these Congressional efforts to eliminate secondary boycotts. Rejection of the doctrine, on the other hand, would inevitably weaken the available protection against such costly and restrictive union practices, with a resultant impact on the construction industry that our economy can ill afford to bear.

In the 25 years since the enactment of Section 8(b)(4), experience has demonstrated repeatedly the

[2] See, e.g., II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1431 (Sen. Kennedy), 1568 (Cong. Griffin); Morris, *The Developing Labor Law* (1971), pp. 57, 609-610.

need for establishing understandable guidelines to delineate between lawful primary and unlawful secondary union objectives. Secondary boycotts generally take place at times of substantial pressures on neutrals, employees, and employers with widely varying interests. In construction particularly, the dispute cannot await litigation, for the project is completed long before formal proceedings are resolved. Therefore all concerned need clear and unambiguous rules which enable the parties to recognize their rights and obligations. When such rules are available, problems are resolved without disruptive tests of economic strength and, indeed, usually without litigation. The Board's decision in the case below, by clearly recognizing the "right to control" the disputed work as one of the principal criteria for identifying the locus of the union's real "tactical object", have provided such an understandable, effective standard.

The experience of members of the American Boiler Manufacturers Association, one of the *amici* on this brief, is an illustration. Since 1932 ABMA members have manufactured packaged, or factory-assembled boilers. Sales have steadily increased because of the unit design of the boilers. This assures better quality, greater efficiency, lower price and broader warranties against defects and malfunctions.

In 1963 ABMA members became the target of a concerted effort by the United Association (the international union involved in this case) to prevent the use and installation of packaged boilers larger than a certain size. In carrying out its campaign, the union sought and obtained restrictive work fabri-

cation clauses in its agreements with mechanical contractors and also invoked product boycotts by refusing to install packaged boilers. In 1963, ABMA filed section 8(e) and 8(b)(4) charges to test the legality of the union's conduct and to forestall the serious threat to continued use of packaged boilers. These charges culminated in *American Boiler Manufacturers Association* v. *N.L.R.B.*, 404 F.2d 547; 404 F.2d 556; (8th Cir., 1968), cert. den. 398 U.S. 960 (1970).

During the seven years required to litigate these charges, the union did not actively pursue its earlier program but, nevertheless, throughout that period and continuing to date, there have been instances where UA locals have attempted to prevent the use of such boilers. Thus, since the *National Woodwork* case decision in mid-1967, ABMA members have reported 12 instances of refusals by UA locals to install packaged boilers.[3] In each case, when the situation was analyzed in the light of the "right to control" doctrine, the legal rights of the parties became clear, the problem was resolved informally and the boilers were installed. In only two instances was it necessary to file unfair labor practice charges and, on both occasions, the problem was handled as soon as the NLRB General Counsel obtained Section 10 (1) injunctions. [*Local 638, UA (Blackhawk Heating)*, Board Case No. 29-CC-202; *Local 638, UA (State University of New York)*, Board Case No. 29-CC-213-214.] No serious conflicts developed in these cases, because the elements of applicable Board

[3] ABMA officials believe there were other similar incidents but only these were reported to the ABMA headquarters.

law could be established quickly and objectively, and the parties could accurately predict the outcome of an economic contest or litigation.

If the reach of the *National Woodwork* opinion is to be over-extended, as we submit is done by the decision of the court of appeals below, and the test of "secondary" activity set out there is to be used, we believe that the foregoing instances of refusals to install packaged boilers would not have been so readily resolved. The court of appeals expressly recognized that under its approach, the distinction between primary and secondary activity would often be a "subtle and difficult one to make." (521 F.2d at 893). If this is true for the NLRB and the courts, certainly the problem could not have been resolved with any degree of assurance by the parties themselves.

The Board's approach, on the other hand, is readily understood and applied by parties to a construction dispute, because it accords with their practical knowledge and experience. They know that when a union exerts pressure against a subcontractor who, through no fault of his own, lacks the power to control assignment of the work the union is seeking, the union's real objective is normally to force a concession by someone else, outside the context of the immediate bargaining relationship. This is not to say that the Board's formula automatically requires that result; the Board has made it clear that it will find exceptions where the circumstances indicate that the dispute is confined to the immediate employer, despite his lack of "control." But in most situations, the Board's approach leaves little room

for disagreement. By according the pressured employer's lack of control over the work the full probative weight it logically deserves, the Board's test makes it possible in the great majority of cases to distinguish easily between union activity which is undertaken for its effect on the immediate employer and that which is, in the words of *National Woodwork*, "tactically calculated to satisfy union objectives elsewhere."

Thus, the "right to control" test, as evolved, refined and currently applied by the Board, is of immense practical value in effectuating the Taft-Hartley provisions. It implements the intent of Congress to eliminate secondary boycotts in the construction industry, where practical realities are such that a less logical, less readily understood standard, such as that advocated by the majority of the court below, would inevitably lead to delays which would render the Act's boycott protection largely illusory.

The *amici* who have joined in this brief know from first-hand experience that effective enforcement of these statutory provisions is essential to permit technological growth and free competition in the construction industry. As designers and specifiers, they must have assurance that the products they believe necessary to the utility, economics and aesthetics of the projects on which they work can be used without arbitrary and artificial restrictions. As manufacturers they must be free to design and manufacture new and improved products that take advantage of advancing technology and increase productivity of construction labor. As contractors they must be protected from being caught between demands of

designers and users to use factory built products and unions who would prevent their installation.

Effective protection against product boycott leads to the essential goal of higher quality construction at lower cost. It is the responsibility of the *amici* to their clients and customers to achieve this end. This goal is beneficial to the public and is in harmony with governmental programs to reach the same result. Higher quality at lower cost is not obtainable, however, without a clear understanding that those who have the responsibility and bear the liability for the success or failure of the necessary new and improved products and techniques must have control over their use.

As specifiers, the *amici* must determine whether a manufactured product should be used on a particular construction project. They are liable if they err. As manufacturers, they must furnish a product that meets specifications. Often they must supply warranties that it will do so. They are liable for any failure. As contractors they must install and place in operation the products specified. Also, they are liable if they do not perform according to instructions. All of the *amici* are continually trying to achieve the highest possible safety standards in the design, manufacture, installation and use of products with which they deal. Both federal and state occupational health and safety laws have rapidly expanded, increasing their responsibility in this area. More accurate and effective tests to assure product safety can be performed in the factory than on the jobsite. When union restrictions force disassembly of a factory built component, approvals

by authorities such as Underwriters Laboratory are invalidated.

When unions are able to set aside these obligations and interfere with the manufacturers' control over the work to be performed, quality is lowered, prices are increased and productivity is impeded. The manufacturer is prevented from fulfilling his function and, frequently, must bear the liability for his inability to do so. Users and the public share the burden of higher costs and lower quality.

We are not unmindful of this Court's observation in *National Woodwork*, *supra*, that is for Congress, and not the courts, to conduct any "re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation" and to determine what kinds of economic weapons should be available to unions and in what general circumstances. 386 U.S. at 644. We do not believe, however, that these considerations should in any way foreclose the Court from considering the practical and economic consequences of the Board's interpretation of the Act, as discussed above, compared with the consequences of the interpretation suggested by the majority of the court below, for the purpose of determining which approach is best calculated to effectuate the purposes of the existing statutory provisions. Particularly in this area, where excerpts of the same legislative record are frequently cited by opposing parties in support of contradictory positions, it is only through an understanding of the practical effects of the Board's and the court of appeals' decision that this Court can accurately judge which approach is most in keeping with the basic concerns that motivated Congress to

enact the boycott prohibitions of the Taft-Hartley and Landrum-Griffin amendments.

III. The Board's Approach Accords the Pressured Subcontractor's Lack of Control Only the Weight It Logically Deserves In Determining Whether the "Tactical Object" of the Union's Pressure Was "Elsewhere"

A. *The Board's Role in Determining Tests for Secondary Activity*

It is well-settled that a violation of Section 8(b)(4)(B) is dependent upon a finding of secondary activity. The problem lies in the method of identifying such activity. Conduct directed at an employer with whom the union has a dispute is "primary" activity and lawful under the statute. Conduct directed at others is secondary and unlawful. *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 635 (1967); *Local 761, Electrical Workers (General Electric)* v. *N.L.R.B.*, 366 U.S. 667, 672-673 (1961). Drawing the line between primary and secondary activity has not been easy and has, therefore, been marked by an evolutionary process. In the words of Mr. Justice Frankfurter:

> The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way during the fourteen years in which it has had to apply § 8(b)(4)(A), and has modified and reformed its standards on the basis of accumulating experience. 'One of the purposes which lead to the creation of such boards is to have decisions

based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.' *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 800; *Local 761, Electrical Workers (General Electric)* v. *N.L.R.B.*, 366 U.S. 667, 674 (1961).

The Board's decision in the present case is the natural result of this evolutionary process going on over a long period of time. Because a definitive formula may not have been wise when the statute was first enacted, it does not follow that a clearly understandable rule cannot evolve after years of experience.

The Board has the initial responsibility for making determinations of secondary activity, and its efforts to draw appropriate lines and establish rules for doing so have been widely accepted in the past. *Local 761, Electrical Workers* v. *N.L.R.B.*, *supra*, 366 U.S. at 671-680; *Local 1976, United Bhd. of Carpenters, et al.* v. *N.L.R.B.*, 357 U.S. 93 (1958); *Houston Insulation Contractors' Ass'n* v. *N.L.R.B.*, 386 U.S. 664 (1967). Such rules express a "practical judgment on the effect of union conduct in the framework of actual labor disputes and what is necessary to preserve to the employer the freedom of choice that Congress has decreed. On such a matter, the judgment of the Board must be given great weight, and we ought not to set against it our estimate of the relevant factors." *Local 1976, United Bhd. of Carpenters, et al.* v. *N.L.R.B.*, 357 U.S. 93, 107 (1958).

B. *The Board's Formula In Operation*

As noted earlier, the Board thoroughly reconsidered its "right to control" doctrine in 1973 in the *Koch* case, *supra*, following several court of appeals decisions expressing the belief that the Board was applying the doctrine as a *per se* test in a manner inconsistent with this Court's decision in *National Woodwork*. In *Koch*, the Board explained that its approach involves two basic steps, each requiring an analysis of the relevant facts and circumstances. First, the Board stated, it examines the factual context to determine whether the union had a valid "work preservation" objective. But, unlike the courts that have criticized its approach, the Board does not end its inquiry there, for it recognizes that even action undertaken to preserve work opportunities for members of the immediate bargaining unit is secondary if its "tactical object" is to force a concession by some other person, not a party to the union's bargaining relationship with the pressured employer. Accordingly, the Board proceeds to consider also whether the union, in pursuing its objective, directed its pressures "at the right person, i.e., the primary in the dispute." 201 NLRB at 64.

This second step of the Board's analysis also entails an examination of the surrounding circumstances. In this respect, of course, the power to control the assignment of the disputed work is of great significance, since it can reasonably be assumed that the ultimate target of a union's economic pressures (i.e., the "primary" in the dispute) will ordinarily be the party having the authority to grant the union

the concessions it seeks.[4] But the Board made it clear that it also takes account of any circumstances pointing to a contrary conclusion, and it has on occasion ruled that economic pressures directed against an employer lacking the "right of control" were nevertheless lawful because the facts showed he was "not truly an 'unoffending employer.'" (201 NLRB at 64).[5] This affords ample protection to employees against deliberate action by their employer to deprive them of the benefits of a valid "work preservation" agreement,[6] without subjecting the employer to eco-

[4] See *Ohio Valley Carpenters District Council (Cardinal Industries Inc.)* v. *N.L.R.B.*, 339 F.2d 142, 145 (6th Cir. 1964), enforcing 144 NLRB 91, "It is reasonable to hold that the object of the union was not an impossible act but was the alternative possible." Essentially, this is but a recognition of the fundamental labor law principle that a party must be presumed to have intended the "natural consequences of his action." *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 45 (1954).

[5] By way of example, the Board cited *Painters District Council No. 20 (Uni-Coat Spray Painting Inc.)*, 185 NLRB No. 136, wherein it found that a subcontractor who took an active role in seeking a license and subcontract which it knew would cause it to breach its "work preservation" agreement with the union could not be deemed an "unoffending employer" entitled to protection under Section 8(b)(4). See also, *Pipe Fitters, Local No. 120, United Ass'n*, 168 NLRB 991, 992 (1967).

[6] The Board also noted that its decision in no way forecloses the union's right to seek a remedy for the contractor's alleged breach of a valid "work preservation" agreement through a civil suit. We submit, however, that to the extent a facially valid "work preservation" agreement is interpreted or applied in a secondary manner, enforcement through judicial action is just as unlawful as enforcement through economic means. See discussion at pp. 32-35, *infra*.

nomic pressure when he merely engages in his business on the terms available to him.

The Board obviously gives the pressured subcontractor's lack of "control" considerable weight in determining whether the union directed its pressure at the proper target, but, as shown above, where warranted by the circumstances, the Board has been willing to find exceptions to the rule. While the Board's approach thus is far from "mechanical", it is easily understandable because it is logical and consistent with the realities of everyday labor-management relations. By recognizing that the "tactical object" of a boycott or work stoppage (in the language of *National Woodwork*) is ordinarily the party having power to accede to the union's demands, the Board merely demonstrates an accurate understanding of fundamental labor relations tactics. The Board's reasoning is thus readily understood and applied by industry and union representatives, because it accords with what they know through experience. There is no vice in simplicity nor virtue in complexity. The validity of the Board's approach must be determined by its effectiveness in accomplishing the ends Congress intended.

The Board's formula gives the control factor neither more nor less weight than it logically deserves. There may be rare exceptions, but, when a union persists in striking an employer who is powerless to comply with its demands, both experience and common sense lead to the conclusion that the real object of the union is to force the struck employer to bring pressure upon the party who does have control over the subject matter of the dispute. For it is clear that in these circumstances the union's real dispute

is not with the struck employer, but with the employer with the right of control. It is the latter employer who created the situation which the union finds unfavorable, and who is the only employer that can remedy the situation. Under these circumstances the most, if not the only, reasonable presumption is that union pressure on an employer who cannot satisfy the union's demands is, in fact, directed at another employer.

In some instances the struck employer may be willing to accommodate the desires of the union or in fact may wish to do so, but cannot because of his contract with the other employer. *Koch*, *supra*, 201 NLRB at 62, n.15, and 490 F.2d at 328. In this situation, the struck employer is in the position of a neutral between the two disputing parties. On the other hand, these same presumptions are not applicable where the struck employer himself has the right to control the matter in dispute. For there the gain from the strike is obvious, and intermediate parties are not embroiled in the application of pressure on the party with control to end the dispute.

Application of the foregoing rationale to the facts of this case is illustrative of both the logic and the sophistication of the Board's formula. Not only did the Board's reasoning reach the logical conclusion of identifying general contractor Austin, the party who had specified the boycotted product and the only one with power to change the specifications, as the ultimate target of the Union's pressure, but in doing so the Board took careful account of the nature of the dispute and how it developed. It pointed out facts indicating that there never was any genuine labor dispute between subcontractor Hudik and the Union

—i.e., that the work in question was not and never had been Hudik's to award; that Hudik was incapable of assigning the work; and that the Union had clearly communicated its refusal to install the Slant/Fin units and the reasons for such refusal to Austin as well as to Hudik. The Board's test, as thus applied, is neither "artificial" nor "mechanical" (*Local 742, Carpenters* v. *N.L.R.B.* [*J. L. Simmons Co.*], 404 F.2d 895 (1971)), but rather a logical and systematic method for determining the Union's true objective in light of all the relevant surrounding circumstances.

C. *The Court of Appeals' Criticisms of the Board's Approach Are Without Merit*

The majority of the court below expresses the belief that the Board's focus on the subcontractor's inability to award the union the work in question misses the primary-secondary distinction in *National Woodwork*. The majority opinion views this distinction as turning on whether the employees have an ongoing dispute with their own employer relating to their claim to the work in question. If so, by reason of their desire to "preserve" their work, the effect on all others is incidental. This reasoning, however, is inconsistent with the *Denver Building Trades* case,[7] and the *Sand Door* case,[8] and subsequent legislative action.

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[7] *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675 (1951).

[8] *Local 1976, United Bhd. of Carpenters* v. *N.L.R.B.*, 357 U.S. 93 (1958).

In *Denver Building Trades*, this Court emphasized that, since there was a contract between the employer subject to the union pressure and another contractor, the situation was materially different from one in which no such contract existed and there was therefore no question of a second contractor being forced off the job. The Court clearly found there that the attempt to force termination of that contract was an illegal secondary objective. Exactly the same situation is found in the present case. The Union's purported objective of "preserving" work or affecting only the relations with the immediate employer, Hudik, could not be accomplished without forcing termination or modification of the contract with Austin, who controlled the work. As the Fourth Circuit recognized in *Koch* (490 F.2d at 326) this Court's decision in *Burns and Roe* clearly establishes the illegality of such an objective under Section 8(b)(4)(B).[9]

Sand Door involved a refusal by the Carpenters' Union, pursuant to a restrictive work practice contract between the union and a contractor, to hang doors made by a non-union manufacturer. This Court found the agreement lawful but that, even though lawful, the contract would not validate union inducement of the contractor's employees not to handle the goods. Congress, in enacting Section 8(e) the following year, made clear that it was attempting to close the loophole opened by *Sand Door* rather than intending to weaken the application of that case. Conference Report (House) No. 1147 on S. 1555, p. 39.

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[9] *N.L.R.B.* v. *Local 825 Operating Engineers (Burns and Roe, Inc.)*, 400 U.S. 297 (1971).

Because *National Woodwork* interprets Section 8(e) as validating work preservation agreements, it does not follow that the case also protects union pressures of the very type found unlawful in *Sand Door* and which Congress specifically said remained unchanged. Yet interpretation of the primary-secondary distinction in *National Woodwork* espoused by the majority of the court below leads to that result and ignores *Sand Door* and the Congressional action completely.

Nor is there any merit to the court of appeals majority's suggestion that the pressure against Hudik-Ross was not for a secondary objective because it might have been possible for Hudik-Ross to obtain relief from the pressure by negotiating a "settlement" with the Union. Not only is this theory entirely speculative, since there is no suggestion in this case that the Union ever wanted to negotiate a "settlement" rather than to be given the work, but it reflects a view of the scope of Section 8(b)(4)(B) which is completely contrary to the intent of the Act.

Initially, the court's view ignores the well-settled principle enunciated in *Denver Bldg. Trades*, *supra*, 341 U.S. at 680, and reaffirmed in *Burns and Roe*, *supra*, 400 U.S. at 303-304, that it is "sufficient [for a Section 8(b)(4)(B) violation] that an objective . . . although not necessarily the only objective," be secondary. Thus, even if the Union might have been willing to forego the actual assignment of the work in favor of some negotiated compromise payment, there can be no real doubt that the assignment of the work to the jobsite employees was at least *an* object of the Union's conduct. Indeed, the very es-

sence of any negotiated "compromise" with the subcontractor would be a recognition that the Union was accepting something in lieu of its basic objective—assignment of the work to its members. The Union's continuing, fundamental goal would still be to have the work performed on the site by journeymen steamfitters, rather than in the manufacturer's plants. And since that basic goal was tactically obtainable only by forcing a concession or change of policy by someone other than the subcontractor, the Union's objective "was unmistakably and flagrantly secondary" (*N.L.R.B.* v. *Local 825, Operating Engineers (Burns and Roe, Inc.), supra*, 400 U.S. at 304), despite the possibility of a negotiated settlement.[10]

Furthermore, the opinion of the majority below rests heavily on the bootstrapping argument that Hudik-Ross could not be considered a neutral because Hudik-Ross had "violated" its "work-preservation"

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[10] Indeed, the majority of the court below appears to acknowledge that at least one objective of the Union's pressure against Hudik-Ross was to cause a change of policy by others. Thus, the court recited the administrative law judge's rhetorical question, "[I]f Hudik . . . does not bid on jobs and does not secure subcontracts, how does such a situation preserve or increase work for Hudik's union steamfitters[?]," and then goes on to state that the answer could be found in the ALJ's own observation that "if prepaid [sic] units cannot be installed . . . Austin and other engineers and general contractors will not specify their purchase and use in buildings." 521 F.2d at 896, n. 25. The majority's opinion, however, reveals its misconception of the primary-secondary distinction by concluding that even conduct with this admitted tactical object is lawful as long as it is undertaken for the benefit of employees in the immediate bargaining unit.

agreement with the Union by bidding on a subcontract which called for the use of prefabricated components. This argument, in turn, rests on the premise that a union can lawfully extend an employer's obligation under such an agreement to any work of a type which its members have traditionally performed, even if the particular work in question is within the exclusive control of another.[11] In other words, the union may enforce a "work preservation" clause so as to require a subcontractor, not only to assign all work of a particular type to his jobsite employees when he has the power to do so, but also to refuse to do business with any general contractor, engineer or other person who will not permit the work to be done by the jobsite employees. We submit that this premise is squarely contrary to Section 8(e) of the Act and is unwarranted by this Court's decision in *National Woodwork*.

As the Ninth Circuit recently stated in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433, 438 (1975), commenting upon the interrelationship of *National Woodwork* and the "right to control" doctrine:

> *A union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign.* When it is applied to work beyond the employer's power to give, a work preservation clause necessarily embodies a prohibited secondary objective. (Emphasis added).

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[11] See also *Local 742, Carpenters* v. *N.L.R.B. (J. L. Simmons Co.)*, —— F.2d ——, 91 LRRM 2595, 2599 (D.C. Cir. No. 73-1120, Mar. 4, 1976).

Thus, the permissible scope of a subcontractor's obligations under a "work preservation" agreement in any given instance must be recognized as limited by the scope of the construction agreement. To hold otherwise would result in the conclusion that the subcontractor has the power to negotiate away not only his own rights, but also the rights of third parties —i.e., the right of builders, architects and engineers to choose the material and products for their projects.[12]

Support for this position is provided by this Court's decision in *National Woodwork*. The Court therein recognized (386 U.S. at 642-643) that the employees' right to a lawful "work preservation" clause is a corollary to the employer's obligation under Section 8(a)(5) to bargain over the contracting out of bargaining unit work under the doctrine established in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964). If this is so, then the scope of the union's rights must be viewed as co-extensive with the scope of the employer's duty. And since, under *Fibreboard*, the employer cannot violate the Act by contracting out what he has never had, similarly under *National Woodwork*, the employees cannot negotiate to preserve work the employer has never

[12] Contrary to the view expressed by the D.C. Circuit in *Local 742, Carpenters (J. L. Simmons Co.)* v. *N.L.R.B.*, 444 F.2d 895, 899, 901 (1971), the subcontractor is not "contracting away" bargaining unit work by signing the construction contract. For rather than "signing a contract that would deprive [unit employees of] work" (44 F.2d at 899), the employer is signing a contract to *provide* them with as much work as is available on the project under the terms offered to him.

had. Thus, in the situation presented here, work preservation was simply not involved and there was no primary labor dispute.

The Fourth Circuit, in *Sachs* v. *Local 48, Plumbers Union*, 454 F.2d 879 (1972), made the very significant observation that the "mark of a labor dispute is the presence of economic adversaries." (454 F.2d at 883). The court pointed out that both the subcontractor and his employees may stand to gain by the exclusion of prefabricated products from the jobsite. For where work is done on the jobsite rather than in a factory, there normally is not only an increase in the available work for jobsite employees, but also a commensurate increase in the contract price paid to the construction subcontractor. See also, *George Koch Sons, Inc.* v. *N.L.R.B.*, *supra*, 490 F.2d at 328. Consequently, the subcontractor may in fact be more than an unwilling ally in the union's effort to cause the construction users to cease purchasing prefabricated products.

IV. This Court Should Approve the Interpretation of Section 8(b)(4)(B) Which Best Harmonizes That Section with the Policies of the Antitrust Laws

Recognition of the coinciding interests of construction subcontractors and building trades unions in preventing the use of prefabricated products suggests another pitfall inherent in permitting unions to reach, via overly-broad application of contracts with subcontractors, work controlled by others: i.e., the problem of conflict with the antitrust laws.[13] It is

[13] See Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 Harv. L. Rev. 904 (1976), where the author suggests that union pressures in right to control

one thing for a union and a contractor to agree that, when the contractor has a choice, he will direct that union members perform work on the jobsite rather than purchase a product which eliminates that work. This, we submit, is the narrow holding of *National Woodwork*.

A quite different issue is presented where, as here, a group of subcontractors and a union agree that the subcontractors will refuse to install a manufactured product, specified for a job or purchased by a user or another employer, thereby precluding users from purchasing the product, architects or engineers from specifying it, and manufacturers from selling it. We submit that this is precisely the type of union-employer combination found to violate the antitrust laws in *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797 (1945), and the reason that this Court, in *National Woodwork*, was careful to point out that it was expressing no view upon the antitrust limitations on work preservation or extension agreements. 386 U.S. 612, n.19.

It is abundantly clear, moreover, that Congress extended Section 8(b)(4) to apply to and preclude boycotts of the type involved in *Allen Bradley*. See, e.g., Legislative History of the Labor Management Relations Act, 1947, p. 428. *Cf. National Woodwork, supra*, 386 U.S. at 628-630. The court of appeals' decision in the present case ignores this intent by construing Rule IX of the Unions' standard agreement with Hudik and other New York area con-

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situations should be viewed as essentially "designed to police a cartel of subcontractors who have mutually agreed not to perform services that must be done on the jobsite unless they are given work which could be done elsewhere."

tractors as a valid obligation not to deal with persons who purchase or specify prefabricated goods. In other words, the court approves an interpretation of the contract that sets out an agreement among businessmen and with a union which clearly constitutes a prohibited restraint of trade.

If the court of appeals' interpretation of Section 8(b)(4)(B) is upheld, then, the effect will be to approve an interpretation of the NLRA which is plainly repugnant to the Sherman Act. And since a partial repeal of the Sherman Act is inferred if there is a "plain repugnancy between the antitrust and regulatory provisions . . .", *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682 (1975), quoting from *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1953), the court of appeals' interpretation, in a Sherman Act proceeding, would require an inference of partial repeal repeal of the Sherman Act to product boycotts. That is contrary to the result suggested by *Connell Construction Co.* v. *Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1975), and *Allen Bradley*, and it is clearly out of keeping with the rule that implied repeals of the antitrust laws are highly disfavored. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, rehearing denied, 411 U.S. 910 (1973); *United States* v. *First City Nat'l Bank*, 386 U.S. 361 (1967); *California* v. *FPC*, 369 U.S. 482 (1962).

This, we submit, is another compelling reason for rejecting the court of appeals majority's interpretation of Section 8(b)(4)(B), and approving instead an interpretation which harmonizes the secondary boycott provisions of the Act with the antitrust laws. That result can be achieved in the present context

by holding, as did the Ninth Circuit in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, *supra*, 514 F.2d at 438, that "a union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign."

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed as prayed for in the petition of the National Labor Relations Board.

Respectfully submitted,

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